



<u>Decision Ref:</u>	2019-0076
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Household Buildings
<u>Conduct(s) complained of:</u>	Rejection of claim - non-disclosure & voiding
<u>Outcome:</u>	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant incepted a Holiday Home Insurance policy underwritten by the Provider in November 2009.

The policy was cancelled from inception by the Provider, on 21 June 2010, on the grounds of non-disclosure of a material fact, that is, that the building was under construction at the time the policy was purchased.

The Complainant's complaint is that the Provider has wrongly cancelled her Holiday Home Insurance policy, in circumstances where she declared all available information at point of sale, and did not deliberately conceal any information from the Provider.

The Complainant's Case

The Complainant took out a policy of insurance on 19 November 2009, through her broker, in respect of her newly built home. The Complainant submits that the construction of the property had been completed in November 2008, and had been certified as complete by the appointed engineer at that time, and also by the valuer who inspected the property on behalf of her mortgage provider.

The policy at issue in this complaint is a Holiday Home Insurance policy, underwritten by the respondent Provider, with full buildings and contents cover in place, for the period of cover 19 November 2009 to 18 November 2010.

The Complainant states that her house was broken into in early May 2010, and that the hot press water cylinder and pipes were forcibly removed and stolen from the property, causing water damage internally to the ceilings, floors, doors, staircase and plasterwork.

The Complainant notified the Provider of a claim under her insurance policy for damage to the insured property, caused by burglary and escape of water, and the Provider arranged for a Loss Adjuster to inspect the insured property on 6 May 2010.

The Complainant disputes the Loss Adjuster's reported findings, following his inspection of the property, that her house was a dwelling under construction rather than a completed holiday home ready for occupancy. She further disputes the Provider's decision, issued to her in a letter dated 11 June 2010, to void her claim from the date of inception on the grounds that she had failed to disclose to the Provider material information regarding the risk when she took out the policy in November 2009.

It is the Complainant's contention that, when the theft occurred in May 2010, the construction of the house was complete and that the process of fitting out the house had begun.

The Complainant states that, despite the proof of completion of the property which she has furnished to the Provider, in the form of the engineers certificate and a valuation report, the Provider has ignored the facts and maintained its decision to void the policy.

The Complainant states that she declared all available information to the broker who recommended and sold her the policy in question. The Complainant states that no information was deliberately withheld at any stage.

The Complainant states that, following the cancellation of her Holiday Home Insurance policy in June 2010, effective from date of inception, she did not receive any documentation in relation to the alternative "fire only" cover which she has been advised was put in place on her property on a temporary basis by the Provider. She states that she did not renew this "fire only" policy in 2011 because she did not receive any renewal documentation from the Provider at the time, and that to date she remains unable to insure her home. The Complainant states that, in any event, the "fire only" cover had been put in place by the Provider without her consent.

The Complainant notes that the Provider has indicated that it returned the premium she had paid for the cancelled policy, but submits that this premium was never received by her.

The Complainant seeks the reinstatement of her Holiday Home Insurance policy and the payment of her claim, and/or compensation.

The Provider's Case

The Provider states that the Complainant's Holiday Home Insurance policy was cancelled on 21 June 2010, from date of inception, when the Provider became aware, following an investigation into a theft loss at the insured property, that the property had been under construction when the policy was purchased in November 2009.

The Provider notes that the house was due to have been completed in late 2009, but notes that, at the time of the incident in May 2010, *"there were no kitchen/usable bathroom facilities in place, snagging issues had arisen relative to the main build, and snagging had not been completed at the time of the incident...The house build was clearly not completed at the time of the incident as demonstrated by the photographs taken..."*.

It is the Provider's position that, at the date of the Loss Adjuster's inspection on 6 March 2010, the property was not yet complete or finished for habitation. The Provider considers that this was information which, had it been declared by the Complainant, would have completely altered the Provider's consideration of the risk. The Provider submits that it would have declined to underwrite the risk. In these circumstances, the Provider submits that the non disclosure was so material that it had no option but to void the Complainant's policy from date of inception.

The Provider acknowledges the Complainant's contention that she declared all available information to the broker who recommended and sold her the policy in question, and her claim that she did not deliberately withhold information at any stage. The Provider submits that it was not informed at inception of the policy that the property had not been completed.

The Provider states that, following the cancellation of the policy, the Complainant's premium was refunded in full in July 2010, via her broker.

The Provider states that it was asked by the Complainant's broker to provide "Buildings in the Course of Construction" cover for the Complainant's property, and that cover was incepted from 21 June 2010, on a fire only basis, for the value of the returned premium. The Provider states that this policy was in force for one year and lapsed at renewal in June 2011 *"as we had not received an update that had been requested from [the Complainant's] broker"*.

The Provider submits that it is maintaining the cancellation of the Complainant's Holiday Home Insurance policy from the date of its inception on 19 November 2009 on the basis of material non disclosure.

The Complaint for Adjudication

The complaint is that the Provider has wrongly cancelled a Holiday Home Insurance policy, in circumstances where the Complainant argues she declared all available information at point of sale, and did not deliberately conceal any information from the Provider.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 11th February 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, the final determination of this office is set out below.

This complaint has arisen following the Provider's cancellation of the Complainant's Holiday Home Insurance Policy on 11 June 2010, from date of inception. The Provider states that it cancelled the policy on the basis that it had "*come to our attention that material information regarding the risk was not disclosed on the Statement of Fact Proposal Form when the policy was taken out*".

The issue for consideration is whether, in the circumstances of this case, the Provider was entitled to void the Complainant's policy from date of inception on the grounds of non-disclosure of a material fact. The Provider has submitted that the Complainant's house was not fully constructed and not ready for occupancy at the date of inception of the policy. The Provider states that, if this material fact had been disclosed by the Complainant at inception of the policy, the Provider would have declined to issue a quote for the Complainant's property as the risk would have been outside its acceptance criteria.

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It is a fundamental principle that insurance is a contract *uberrimae fidei*, that is, of utmost good faith. The proposer is under a duty to disclose all material information when proposing for cover. Material information is any information which is known to the proposer or deemed to be known to the proposer which is likely to influence an insurer in the acceptance of a risk and/or the terms applied. Failure by the proposer to disclose fully such information entitles the insurer to decline any claim or to void the policy from inception.

The Complainant states that she did not deliberately withhold any information from the Provider in November 2009, when she took out the policy in question, and that she declared all available information to the broker who recommended and sold her the policy in question. The Complainant has been advised that, if she has a complaint against her broker in this regard, it should be directed to that broker.

The Complainant does not dispute that she sought to purchase a policy of household insurance for her new build home on the basis that the construction stage was complete. The Complainant submits that her house had been certified as complete by the appointed engineer in November 2008, and that it was on this basis that she sought full insurance cover for her property, and that the Holiday Home Insurance policy which is the subject of this complaint was put in place. It is the Complainant's position that there was no non-disclosure in this regard, that the construction of her home was complete in November 2009, and that she had submitted documentary proof of this. The Complainant does not accept that any information was withheld from the Provider.

By way of background I note that, prior to taking out the Holiday Home Insurance Policy in dispute, the Complainant had her new-build house insured with a different underwriter between November 2007 and November 2008, under a "Buildings in the Course of Construction" policy. The submissions indicate that this policy was amended by her broker to a full buildings and contents policy in November 2008, and that in November 2009 the Complainant took out a new home insurance policy, through her broker, underwritten by the Provider concerned in this complaint. This is the policy, with full buildings cover in place, that is the subject of this complaint.

The submissions show that the Complainant notified the Provider of a claim under her policy following a break in at her home in May 2010. I note that the Provider appointed a Loss Adjuster to inspect the insured property and that, in his preliminary report dated 10 May 2010, following this inspection, the Loss Adjuster reported on the nature and extent of the damage to the property as follows:

"The burglars smashed a kitchen window in forcing entry to the house whilst they also stole the hot press water cylinder along with some general copper piping. The main source of damages however relate to the substantial subsequent escape of water damages sustained to ceilings, wall plaster, wooden flooring, skirtings, doors and the wooden stairs were all impacted and damaged..."

In his preliminary report, the Loss Adjuster commented on the use and description of the premises in the following terms:

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"The build started about 2007 and is currently at snagging stage we are advised. The house is being constructed by your Insured on lands owned by her parents with the building not yet being ready for occupancy. The house is not yet completely finished with finishes such as the kitchen, decorations, tiling, upstairs flooring finishes, decoration, entrance and most sanitary ware finishes still remaining incomplete. We understand that the main builder is currently working through snag list items whilst in addition problems with external window and door finishes were identified which also need to be addressed by the builder.

Nobody is in occupancy of the house whilst in addition the house is unfurnished. The house at this stage is not ready for normal occupancy in its current unfinished state..."

I note that the Provider's Loss Adjuster wrote to the Complainant on 20 May 2010 in respect of her claim, and advised as follows:

"...We wish to advise that we have reviewed the Statement of Fact and Schedule of Insurance and note that the house was insured as a holiday home. We are of the opinion, however, that the fact that the house is still under construction should have been advised to [the Provider] prior to inception. The house is currently not fully constructed and is not ready for occupancy. We are therefore of the opinion that this is non-disclosure of a material fact at inception."

The Loss Adjuster advised the Complainant further that:

"...Separately to the above, we have also noted under the relevant peril, stealing or attempted stealing, that loss or damage is specifically excluded while the holiday home is unfurnished. We note this exclusion under both the Buildings and Contents section.

We also note under the escape of water peril, the exclusion applying while the holiday home is unfurnished.

In all the circumstances we would hereby wish to confirm that the policy shall not be of benefit in relation to the incident giving rise to the claim or in relation to the damages sustained..."

The submissions show that the Provider wrote to the Complainant on 11 June 2010, in respect of her claim, to advise as follows:

"...It has come to our attention that material information regarding the risk was not disclosed on the Statement of Fact Proposal Form when the policy was taken out. The failure to disclose this information directly influenced our decision to accept the risk which would have been declined otherwise.

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We regret that due to this misrepresentation, we have no option but to declare this Policy void from inception date. The voiding of this policy confirms that no insurance cover has been provided under this policy and therefore all premiums collected to date will be returned”.

The Complainant has disputed the Loss Adjuster’s reported findings, following his inspection of the property, that her house was a dwelling under construction rather than a completed holiday home ready for occupancy.

The Complainant has also disputed the Provider’s decision to void her policy from the date of inception on the grounds that she had failed, when she took out the policy in November 2009, to disclose to the Provider material information regarding the risk.

It is the Complainant’s contention that, when the theft occurred in May 2010, the construction of the house was complete and that the process of fitting out the house had begun. The Complainant submits that her property had been connected to both a water and electricity power supply, had an oil tank and burner, a copper water cylinder, a back boiler and a solid fuel stove. In a submission to this office dated 3 August 2017, the Complainant stated that:

“...The upstairs flooring was complete at the time of...inspection. Kitchen tiling and all oak floors had been finished downstairs. Bathroom tiles, bath, showers and other sanitary ware were all in situ awaiting fitting which had been delayed due to snagging stage underway. Whilst staying at my house during this period I availed of bathroom facilities in my parents’ home which is close by, within 150 metres...”

The Complainant states that documentation confirming the completed construction of the building was forwarded to the Provider by her architect, in the form of legal certification of completion of the building which had been signed and submitted to her bank for mortgage purposes, accompanied by an independent letter from the bank’s engineer stating that the house was complete.

Furthermore, the Complainant maintains that she had stayed in the house “on numerous occasions”, and that the house “was furnished to the degree that I could stay there while I continued to further furnish and decorate my home”, although she states that a lot of this furniture had been removed prior to the Loss Adjuster’s inspection in order to avoid further water damage.

In her correspondence with this office, dated 3 August 2017, the Complainant submitted that:

“Ultimately, it is alleged that I have misrepresented the facts regarding my home and this is not the case. I absolutely refute the reports and letters of [the Loss Adjuster]. My position is supported by numerous third parties, including two engineers, one acting on behalf of the bank issuing me certificate of completion, the bank releasing my final drawdown, the ESB connecting my power supply, the connection of my property to a water supply, post delivered to my home. This has

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been a nightmare situation where even my good name and reputation has been taken away from me. Even looking at the basics of [the Loss Adjuster's] report it is so inaccurate in fact and yet I have been completely let down by the insurance industry. I even to this date have been left with an uninsured property which runs completely against how I conduct my business."

I note that the Complainant submitted further that:

"I have attached a number of dated documents and receipts in relation to my ESB connection, oil supply, various flooring products, various sanitary ware products and specific items required for my water supply connection to my home at [the insured property]. Some of these show an address at ...my parents' home. This was to allow for deliveries requiring signature and where I left payment in the event of me working in Dublin".

The Complainant has also furnished certain documents as evidence of the completion of the construction phase of her property in November 2008. She has submitted a copy of a Stage Payment Certificate, dated 12 November 2008, completed by the engineer appointed by the Complainant to supervise the construction of the property, for return to the Complainant's mortgage lender in order to obtain the release of the remaining mortgage funds. In this Stage Payment Certificate, in response to the question "what stage of construction is the property at?" the appointed engineer certified that on 12 November 2008 the property was "complete".

The Complainant has also submitted a Final Valuation Report in respect of the property from an auctioneer and valuer, dated 10 November 2008, which stated as follows:

"I wish to confirm that all works have been completed. We are therefore looking for the final release of all monies to be drawn down".

The Complainant relies on these documents as evidence that the construction of her house was certified complete in November 2009, and that it was on this basis that she took out the Holiday Home Insurance policy which is underwritten by the Provider, and which is the subject of this complaint.

I note that correspondence from the Complainant's architect to the Provider, dated 13 July 2010, contains the following account of what happened subsequently:

"...On completion of the dwelling house at the point at which [the Complainant] was beginning to fit out and move into the house a number of items were noted. I was requested to visit the dwelling and on review of the items which were noted, it was requested that [the Complainant] remove all items of her personal furniture and belongings from the house which at the time was furniture for the bedrooms/sitting rooms/kitchen and bathroom furniture suites while remedial works were undertaken. On completion of this work the house was in a position where [the Complainant] was again ready to move in. It is my understanding that [the Complainant] had stayed in the house intermittently over the period of time

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between November and December. I can personally verify that there was a bed in the upstairs bedroom on the date I was asked to revisit the dwelling. I assume the close proximity to [the Complainant's] home house meant facilities and cooking were taking place there while the house was being furnished. In December 2009, due to the inclement weather, a fault with the windows was discovered, water ingress occurred in all windows to the front of the dwelling. I issued a report on the item and requested that valuables e.g. furniture, paintings etc be removed from the house and no kitchen installed until such time as the windows were repaired. Bathroom fittings were not installed at this point as the builder had been requested to remedy a number of issues relating to the bathrooms up and down stairs...

In the time during the remedial work the house was broken into and the hot water cylinder on the first floor was forcibly removed, causing water damage..."

The complaint under examination is against the underwriter of the policy. An Underwriter is entitled to rely on the information provided in the Statement of Fact, or proposal form for insurance. Here this the proposal information was provided by the Complainant's broker in November 2009. This document is the basis of the insurance contract, and any failure by the customer to give accurate answers to the questions asked in the document may invalidate the insurance contract or any claim made.

I have considered the Statement of Fact submitted. It contains details relating to the Complainant, the Complainant's insurance history, the property to be insured, the nature of the occupancy of the property, the policy sections operative and the sums insured. The document contains the following statement, in bold print:

"This Statement of Fact Proposal Form does not require your signature. It is a record of the information provided about your risk and upon which insurers have relied when deciding whether to accept this insurance, what terms to apply and the premium. Your acceptance of the policy confirms your agreement that these statements made by you or on your behalf are true and complete to the best of your knowledge and belief. The information contained in this Statement of Fact Proposal Form shall be incorporated in the contract between you and the insurer. This Statement of Fact Proposal Form should be read in conjunction with the policy booklet and policy schedule".

The document explains the consequences of a failure to disclose all material information, as follows, in bold print:

"Failure to disclose all material information, or disclosures of false or misleading information could result in

- ***The policy becoming void***
- ***A claim not being paid or the amount reduced***
- ***Additional premiums which we reserve the right to collect***
- ***Terms and conditions of the policy being amended***

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Material information is any fact the insurer would regard as likely to affect acceptance or assessment of the risk. If you are in any doubt whether information is material you should disclose it...

I note that it was detailed in the Proposal Form, among other things, that the property to be insured was used as a holiday home, that it was occupied solely as a private dwelling, that it was in a good state of repair, that the property was built "2000 – to date", and that both buildings and contents insurance were required, excluding accidental damage.

I note that the answer "NO" was provided in response to the following question in the Proposal Form:

"Important – Material and/or Additional Information

Is there any additional information you wish to bring to our attention regarding the risk being proposed that might be considered material by underwriters?"

"Occupancy Details

Is the property occupied solely as a private dwelling? i.e. is not used for business purposes other than holiday accommodation? Answer recorded "YES"

How will this property be used? Answer recorded "Family Use Only – No rental use allowed"

The policy was put in place on the basis of the information contained in the Proposal Form, and the policy schedule was issued on 19 November 2009. The Complainant's policy schedule has been submitted in evidence. It indicates that the insurance in question is a "Holiday Home Insurance", and that the period of insurance was "From 19.11.2009 to 18.11.2010". The schedule details that the cover in place was Buildings and Contents cover, excluding accidental cover, and that the occupancy of the property was "Family use only – no rental use allowed".

"Special conditions apply whenever an insured property is unoccupied during the months of November to March inclusive".

Holiday Home Insurance Policy Document:

"Welcome: (Page 1)

...Please check your proposal form to ensure that the details contained on it are accurate as this document forms the basis of your insurance contract. Your acceptance of this policy indicates your agreement that the details contained on the proposal form are accurate.

...You should advise us immediately if the use of your home changes, such as it becoming let out to tenants, becoming unoccupied or being used for a business purpose. You should also advise immediately if the nature of your home changes in

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a way that might affect our attitude to the cover provided such as during the building of an extension. If you are in any doubt about whether a change is material, please notify it..."

Definitions: (Page 3)

Unfurnished

Not adequately furnished or equipped for normal living purposes. In the case of a newly constructed or renovated house, it will be deemed unfurnished if either the water or electricity service has not been connected.

Unoccupied

Not stayed in overnight by a member of your Household or any other person authorised by You."

Policy Terms and Conditions: (Page 19)

Misdescription

This policy will be voidable in the event of misrepresentation, misdescription, or non-disclosure of any material facts i.e. those circumstances which may influence us in our acceptance or assessment of this insurance. If you are in any doubt as to whether a fact is material or not please disclose it. This condition applies at inception of your policy and at renewal each year.

Change in Risk or Circumstances

You must tell us in writing IMMEDIATELY of any change, which may affect this insurance or increase the risk of loss, damage or injury. Such changes include, but are not limited to

- (a) If the occupancy of the house changes (ie. becomes let out full time or becomes unoccupied)*
- (b) If a business is carried on from the buildings.*
- (c) If the property is being structurally altered.*
- (d) If an extension is being built,*
- (e) If non standard materials are used in the construction of a new extension.*

Failure to advise us of a change could invalidate the cover provided or could result in a claim being rejected or reduced. If you are in any doubt as to whether a change is material or not, you should notify us.

...

Unoccupied Properties Special Terms and Conditions

"Whenever the Holiday Home is unoccupied anytime from 1st November to 31st March inclusive each year, then you must comply with conditions (1) and (2) below.

- (1) A responsible person must be appointed to supervise and regularly check the property.*

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(2) The water must be turned off and the water system drained. This condition (2) shall not apply if the central heating system is set to be automatically brought into use daily by means of a time switch and any loft hatch or door is left open. In addition, if there is a thermostat fitted to the central heating system, then this must be set to a minimum temperature of 55 degrees Fahrenheit. You must ensure that an adequate fuel supply is available to ensure compliance with this requirement."

The only reference to a time frame for occupancy appears in the contents section of the policy, that is, "Where the holiday home has been Unoccupied for more than 35 consecutive days immediately prior to the loss or damage".

Premium Refund and Temporary Cover

The Complainant submits that, following the cancellation of her Holiday Home Insurance policy in June 2010, effective from date of inception, she was told by the Provider, in its letter to her dated 11 June 2010, that she would receive a return of the premium she had paid for the cancelled cover. The Complainant submits that this premium was never received by her.

The Complainant states that she has been advised by the Provider that temporary "fire only" cover was put in place on her property in June 2010, on a "Buildings under the Course of Construction" basis, following the cancellation of her policy. The Complainant states that she did not receive any documentation from the Provider in relation to the alternative "fire only" cover which was put in place, and that, in any event, it was put in place by the Provider without her authority or consent.

The Complainant states that she did not renew this "fire only" policy in 2011 because she did not receive any renewal documentation from the Provider at the time, and that to date she remains unable to insure her home.

The submissions show that the Provider's letter to the Complainant dated 11 June 2010, advised as follows, in respect of the refund of premium following the voiding of the policy:

"The voiding of this policy confirms that no insurance cover has been provided under this policy and therefore all premiums collected to date will be returned".

It is the Provider's position, stated in an email to this office dated 28 June 2013, that the premium refund in respect of the cancelled policy was transmitted to the Complainant's broker on 26 July 2010.

The Provider states further that the Complainant's broker arranged a "Course of Construction" policy on a "fire only" basis in June 2010, and that it is the Provider's understanding that the refund of premium "may have been offset against the premium due for the new policy".

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With regard to the new policy, the Provider has submitted that:

“This policy was incepted in June 2010 as the property was still, at that time, under construction and we were to be advised once construction was complete. We requested an update in May 2011 and did not receive any information and the “Course of Construction” policy therefore lapsed at renewal June 2011”.

Analysis

I must assess whether there was a full disclosure to the Provider by the Complainant as to the completeness of the property. In this regard, I am mindful of the decision in *Chariot Inns Ltd v Assicurazioni Generali spa [1981] IR 199* wherein the Supreme Court stated that the test for materiality is:

“...a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk, and if so, in determining the premium which he would demand. The standard by which materiality is to be determined is objective and not subjective.”

I am further mindful of the well accepted principle that a contract of insurance is a *“contract of utmost good faith on both sides”* and I note the dicta of Mr Justice Barrett in *Earls -v- The Financial Services Ombudsman & Anor [2015] IEHC 536* in relation to this duty wherein he outlined that;

“The duty of utmost good faith requires a genuine effort to achieve accuracy using all available sources; to require disclosure of all material facts which are known to an insured may well require an impossible level of performance”

With regard to my assessment of whether the fact that was not disclosed was a material fact, the High Court in *Earls* (cited above) decided that this office should not proceed on the basis that if a material fact was not disclosed then, *ipso facto*, there has been a breach of the duty of disclosure. Rather in the Court’s opinion, this may not always be the case, as the duty arising for an insured in this regard, is to exercise a *“genuine effort to achieve accuracy using all reasonably available sources”* and on the facts of the case in *Earls* it was noted the proposers *“memory and experience”* in the characterisation of the event was relevant.

Consequently, it is evident that the test for materiality is an objective one and the proposer is required to disclose every matter which a reasonable person would consider to be material to the risk against which indemnity is being sought.

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Furthermore, I note this general duty may be limited in particular circumstances by reference to the form of questions asked in the proposal form. Consequently, I must consider whether the particular questions that were asked of the Complainant on the Proposal Form had limited that general duty.

In this regard, it is recognised by Finlay CJ in *Kelleher v Irish Life Assurance Company [1993] 3 IR 393* Finlay CJ that the test is as follows:

“whether a reasonable man reading the proposal form would conclude that information over and above it which is in issue was not required”

Consequently, the question at issue is also to be assessed by reference to the reasonable person.

Ultimately this complaint concerns what was communicated and understood by the parties about the completeness of the construction of the property.

I accept that the Complainant had reasonably endeavoured at all times to ensure that her property was correctly insured. The Complainant had a policy in place while the house was in the course of construction. When her property was later certified as complete by her engineer and by way of a valuer’s report a full buildings policy was arranged.

However, it is clear that the Provider (the Insurance Company) had a different understanding than the Complainant of what constituted completeness in relation to the construction of the property.

The Provider considered that for the property to be complete in its construction it would have had to have a kitchen and bathroom installed. The Provider also disputed that the property was adequately furnished or equipped for normal living purposes.

On the latter point I consider that the question of a property being adequately furnished or equipped for normal living purposes is subjective, in that what one person considers to be adequately furnished for normal living purposes would differ from what another person would find acceptable. The only guidance or examples of what the Insurance Provider considered would indicate an unfurnished house would be that: *“In the case of a newly constructed or renovated house, it will be deemed unfurnished if either the water or electricity service has not been connected”*.

The evidence indicates that the water and electricity services had been connected to the Complainant’s property.

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The specific requirements for there to be a fully functional bathroom and kitchen in place, were not set out by the Provider. The Complainant's testimony evidences that in relation to her living arrangements for the time she occupied the property in question, she relied on the facilities in her parent's home, which she says was only 150 meters away from her house. The Complainant's property was a new build and it is understandable that not everything was going to be completely finished in relation to services and furnishings for a time. The house was for the Complainant's own use and not for rental purposes, therefore there was no regulatory requirements on her as to its habitable condition for her own stay there.

Given that the Provider had a clear idea of what constituted completeness in relation to the construction of the property and the furnishing of same, it is reasonable to expect that the Provider would have been clearer in its communications with the Complainant on those requirements when she sought to protect her property by way of insuring same. In this regard I consider the need for guidance or clarity from the Provider, on the questions that were asked of the Complainant by the Provider on the Statement of Fact.

I note that it was detailed in the Proposal Form, among other things, that the property to be insured was used as a holiday home, that it was occupied solely as a private dwelling, that it was in a good state of repair, that the property was built "2000 – to date", and that both buildings and contents insurance were required.

I note that the answer "NO" was provided in response to the following question in the Proposal Form:

"Important – Material and/or Additional Information

Is there any additional information you wish to bring to our attention regarding the risk being proposed that might be considered material by underwriters?"

"Occupancy Details

Is the property occupied solely as a private dwelling? i.e. is not used for business purposes other than holiday accommodation? Answer recorded "YES"

How will this property be used? Answer recorded "Family Use Only – No rental use allowed"

The policy was put in place on the basis of the information contained in the Proposal Form, and the policy schedule was issued on 19 November 2009. The Complainant's policy schedule has been submitted in evidence. It indicates that the insurance in question is a "**Holiday Home Insurance**", and that the period of insurance was "**From 19.11.2009 to 18.11.2010**". The schedule details that the cover in place was Buildings and Contents cover, excluding accidental cover, and that the occupancy of the property was "**Family use only – no rental use allowed**".

As regards the questions that were asked and answered in relation to the "Property Details" on the Proposal Form, it is noted that the following was answered in relation to what year the property was built. The recorded answer is "**2000 – To Date**".

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This was an indefinite timeframe and I consider reasonably indicated that there was work still ongoing with the property, be that concern its furnishings or in the installation of the different elements such as the bathroom and kitchen. I consider that this indefinite timeframe should have reasonably caused the Provider to further question these matters but it did not.

Again I note that an incomplete answer was given to the question as to what was the *"Approximate area of the property in square feet?"* The answer recorded was **"Not Known"**. I consider that this also would have reasonably required a further query from the Providers, but there is no evidence of such enquiry.

There was a question as to *"What was the primary source of heating for the property"*. The answer recorded is **"Not Known"**. I consider that this should also have reasonably been further queried, but was not.

I consider that the above questions are clearly related to the structure and completeness of the property and reasonably required further clarification from the Provider. I consider that had such further enquiries been made by the Provider as to what was meant by the answers given by the Complainant, it would have given the Provider a clearer picture of the condition of the property to be insured. The Provider could have duly clarified matters and / or could have informed the Complainant of any problems it had in relation to insuring such a property. I find no such evidence of further enquiries being made by the Provider here.

While there is no general duty of enquiry on a Provider in relation to matters that should be disclosed by a proposer for insurance, where a Provider has sought specific information on the risk property and is put on notice of matters pertaining to that risk, such general enquiries are reasonably expected. This is particularly so, as there are serious implications resulting from a policy cancellation and where all the correct steps are taken by the parties those implications can be avoided.

Overall I consider that the policy should not have been cancelled / voided for non disclosure, and that the claim should have been admitted as a coverable claim under the policy.

As regards the premium refund issue, I am satisfied that the Insurance Company's action in paying the refund to the Broker would have been the usual practice. What the Broker did with the premium refund would not be a matter for the Provider to address.

It is my Legally Binding Decision that this complaint is upheld and I direct that the Provider pay the claim in accordance with the policy terms and conditions.

In respect of the failings identified in the set up of the policy by the Provider leading to the situation that arose, that is the avoidance of the policy and the refusal to deal with the claim, I direct that the Provider pay the Complainant the compensatory payment of €8,000 (eight thousand euro). For the avoidance of any doubt this compensatory payment is in

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addition to the claim settlement amount. I also direct that any record of the cancelled policy for non disclosure be corrected by the Provider.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld, on the grounds prescribed in **Section 60(2)(g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of by reinstating the policy and paying the claim in accordance with the policy terms and conditions. I also direct that any record of the cancelled policy for non disclosure be corrected by the Provider and the Provider is to make a compensatory payment to the Complainant in the sum of €8,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

6th March 2019

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—
- (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
- and

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.